2013 WL 5297305 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Paul DYER, Plaintiff-Appellant,
v.
SUPERINTENDENT OF INSURANCE, Defendant-Appellee.

No. BCD-12-469.
March 25, 2013.

On Appeal from the Superior Court (Business and Consumer Docket)

Reply Brief of Appellant

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I. Dyer's Challenges to the Sufficiency of the Superintendent's Findings are Properly Before this Court

The Superintendent takes an unduly narrow view of when issues are preserved for appeal when he argues that Mr. Dyer waived "most" of his factual challenges to the Superintendent's findings. Mr. Dyer squarely raised the disputed issues first before the Superintendent and then before the Superior Court. They are thus properly before the Court now.

An issue is preserved for appeal if there was "a sufficient basis in the record to alert the court and any opposing party to the existence of that issue." *Verizon New England, Inc. v. Public Utilities Com 'n*, 2005 ME 16, ¶ 15, 866 A.2d 844, 849 (quoting *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 2002 ME 127, ¶ 22, 818 A.2d 995, 1002). [1]

It is disingenuous for the Superintendent to claim that Mr. Dyer failed to challenge the sufficiency of the evidence underlying the Superintendent's findings before now. Ms. Van Horn was the Bureau of Insurance's key witness and her testimony provided the primary evidence for nearly all of the Superintendent's findings. [2] Mr. Dyer clearly and unambiguously challenged Ms. Van Horn's credibility before the Superintendent and did so again before the Superior Court. (R. 193-94; (Petitioner's Rule 80C Brief dated July 5, 2011 ("First 80C Br."), 15-17) (section titled "The ***2** Superintendent Erred in Crediting Ms. Van Horn's testimony").

Mr. Dyer made even more specific challenges to these findings during the Rule 80C appeals before the Superior Court. [3] In his first 80C Brief, Mr. Dyer challenged the Superintendent's finding that the SPIA was inappropriate for Ms. Van Horn, (First 80C Br., 13, 25-26), and that Mr. Dyer did not ensure the SPIA was issued appropriately. (First 80C Br., 25.) Mr. Dyer also argued that the Superintendent "misconstrued" Ms. Van Horn's testimony on the voicemail message from Old Mutual (First 80C Br., 24-25), and challenged the Superintendent's exclusion of the testimony of John Consigli. (First 80C Br., 18-20.) Mr. Consigli was prepared to testify that, based on a polygraph examination, Mr. Dyer was truthful with regard to, among other things, receiving a voicemail from Old Mutual. (R. 158, 168.) Mr. Dyer again challenged the Superintendent's determination on the suitability of the SPIA in his Reply, pointing out that "the Superintendent found, without any evidence, that because of a low yield, the SPIA was not a suitable investment for Ms. Van Horn." (First Petitioner Reply Br., 2.) In his Brief filed in the second 80C action, Mr. Dyer clearly raised the issue that the penalties imposed were disproportionately harsh given the case involved a single annuity sold to a single customer, the so-called "whole record" challenge referred to Superintendent now.

(Petitioner's 80C Brief dated June 26, 2012 (“Second 80C Br.”), 20.) In his Reply filed in the second 80C action, Mr. Dyer challenged the Superintendent's overblown suggestions of improper and/or dishonest conduct. (Second Pet. Reply. Br., 10.)

With regard to the finding that the SPIA was inappropriate for Ms. Van Horn, the ***3** Superintendent misreads the Superior Court's Rule 80C Decision and Judgment dated September 5, 2012 (“Second 80C Decision”). In its Second 80C Decision, Superior Court noted, sua sponte, the Superintendent's conclusion that some of Mr. Dyer's conduct violated 24-A M.R.S.A. § 1467, requiring a consultant to act in the clients best interest, and that Mr. Dyer had not challenged that conclusion. (A. 34.) The Superior Court was only noting that Mr. Dyer had not challenged the Superintendent's conclusion that the finding that the SPIA was inappropriate for Ms. Van Horn constituted a violation of Section 1467. (A. 34.) Mr. Dyer does not challenge that conclusion before this Court but rather the underlying finding: whether the SPIA was appropriate for Ms. Van Horn. It is a gross over-reading of the Superior Court's statements to conclude that the court was suggesting that Mr. Dyer had waived any challenges to the factual sufficiency of the Superintendent's findings with regard to the sufficiency of the SPIA. Moreover, as discussed above, a review of the record reveals that Mr. Dyer squarely raised the suitability of the SPIA before the Superior Court.

The fact that some of Mr. Dyer's challenges to the Superintendent's findings were discussed below in the context of bias on the part of the Superintendent does not affect whether they were preserved for appeal. The Superintendent's argument on this point, made in a footnote, is the definition of form over substance. (Red. Br., 22.) [4]

Both the Superintendent, and later, the Superior Court had fair notice that Dyer was challenging the factual basis for the Superintendent's findings. See ***4** Chasse, 580 A.2d at 156. Those arguments were preserved and are properly before this Court now.

II. The Superintendent's Core Findings Lack Substantial Evidence in the Record

A. It is Within this Court's Purview to Consider Whether Ms. Van Horn was an Unreliable Witness Whose Testimony Compelled Disbelief

This Court reviews an agency's factual findings for whether they are supported by substantial evidence. *Gulickv. Bd. Of Envtl. Prot.*, 452 A.2d 1202, 1207 (Me. 1982). “Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion.” *Thacker v. Konover Dev. Corp.*, 2003 ME 30, ¶8, 818 A.2d 1013, 1017. Although a court may not substitute its credibility determinations for the agency's, an agency's credibility determinations may be disregarded when the evidence compels disbelief. *Merrow v. Maine Unemployment Ins. Comm'n*, 495 A.2d 1197, 1201 (Me. 1985); *WS. Libbey Co. v. Maine Employment Sec. Comm‘n*, 446 A.2d 42, 43 (Me. 1982). An agency's credibility determinations, although entitled to deference, are therefore not beyond judicial review. *See id.*

Here, Mr. Dyer does not challenge the Superintendent's decision to credit Ms. Van Horn'S testimony over Mr. Dyer's. Rather, Mr. Dyer challenges the Superintendent's crediting of Ms. Van Horn's testimony at all. The Superintendent relied on Ms. Van Horn's testimony in making many, if not all, of the factual findings. If that testimony is so inherently unreliable so that it cannot constitute substantial evidence - which it cannot - then those findings lack substantial evidence in the record and are properly set aside. *See id.*

The Superintendents statement that “credibility determinations are ‘exclusively’ for the factfinder,” while not inaccurate on its own, fails to acknowledge this Court's ***5** authority to police the outer boundaries of an agency's credibility determinations as set forth above. *See id.* The Superintendents position, taken literally, suggests that an agency's factual determinations are effectively un-reviewable so long as at least at least one piece of evidence was presented on a point, no matter how weak, contradictory or incredible. This argument runs counter to established case law and general principles of judicial review. *See id; see also* 5 M.R.S.A. §11006(4).

B. Ms. Van Horn's Testimony Could not Reasonably be Credited

Despite the Superintendent's post-hoc efforts to clean-up her testimony, the record reveals Ms. Van Horn as being a clearly unreliable witness. Contrary to the Superintendents assertions, Ms. Van Horn demonstrated confusion and a distinct lack of memory on key points. First, with regard to Ms. Van Horn's gift to Ms. LaPierre, the record is clear that Ms. Van Horn first denied that she had ever given Ms. LaPierre, her granddaughter, any money, other than for school (A. 215), and then emphatically denied that she ever made Ms. LaPierre a beneficiary of her state retirement account. (R. 491; A. 227.) When confronted with a letter clearly indicating that she had made Ms. LaPierre a beneficiary, Ms. Van Horn acknowledged that she "may have done that and not remembered it." (R. 492; A. 228.) She then acknowledged that she took all the money out of the retirement account, and gave it to Ms. LaPierre. (A. 228, 291). This was not a "momentary lapse" as urged by the Superintendent. (Red. Br. 27.) Ms. Van Horn only corrected herself when presented with a letter clearly indicating her recollection to be wrong. (R, 492; A. 228.) The testimony demonstrates that despite apparent confidence in her recollection, Ms. Van Horn's memory was exactly opposite to what in fact occurred.

***6** This error was also far from "trivial" as the Superintendent claims. (Red. Br. 26.) Whether Ms. Van Horn was transferring assets to Ms. LaPierre, her granddaughter, is relevant to whether she had any intention to gift her assets during her life. The Superintendent relied on Ms. Van Horn's testimony that she had no intention to gift assets to her children before she died as evidence that Mr. Dyer failed to explain the plan to Ms. Van Horn and that the SPIA was unsuitable for her. (R. 199-201; A. 66-68.) Proof that Ms. Van Horn was, in fact, making inter vivos gifts to her grandchildren significantly undermines her testimony and, by extension, the Superintendent's findings.

This also undermines the Superintendent's attempts to account for Ms. Van Horn's memory failings. The Superintendent explained away Ms. Van Horn's clear memory deficiencies by stating that "when [Ms. Van Horn] lacked memory of prior events, she readily acknowledged it" and that "[h]er testimony on most important points was clear and consistent." (R. 202; A. 69.) Prior to being confronted with a document clearly indicating her error, Ms. Van Horn did not indicate a lack of memory concerning her retirement account and had testified clearly and without reservation. (R. 491-92; A. 227-28.) It defies reason for the Superintendent to then rely on these supposed indicia of credibility in crediting Ms. Van Horn's other testimony.

Ms. Van Horn repeatedly failed to recall key documents, including a letter to the Bureau of Insurance, the complaint Ms. Van Horn filed with the Bureau of Insurance and the consultant agreement with Mr. Dyer. (A. 213-14.) The fact that Mr. Dyer drafted these documents does not minimize their importance and does not change the fact that Ms. Van Horn, presumably, reviewed these documents before signing her name. Similarly, Ms. Van Horn did not recall signing a contract for the SPIA, (A. 202), and did ***7** not recall receiving a copy of the Bickerman letter, but recognized her handwriting on a copy of the letter. (R. 483-485, 955-960; A. 119-221, 285-290). Although Mr. Dyer does not dispute that many exhibits were entered into evidence, Ms. Van Horn was shown only a few and was not expected - as the Superintendent suggests - to remember them all. (Red Br., 26-27). [5]

The Superintendent attempts to minimize the numerous acknowledgements by Ms. Van Horn that she had no memory of certain events by characterizing them as evidence of a "self-deprecating sense of humor" or "jokes". (Red Br., 24-25). He calls Dyer's references to them as "cherry-picked, out-of-context snippets." (Red Br., 24). While Ms. Van Horn may well have presented these statements with a self-deprecating touch, the information being conveyed was clear: she was aware that her memory was poor. It would be absurd to think that Ms. Van Horn would have made such jokes, while giving sworn testimony no less, unless there was a basis for this underlying truth. Her statements, joking or not, were not out of context "snippets", but rather, glaring red flags with regard to the accuracy of her testimony. [6]

Finally, the Superintendent's proposed reading of Ms. Van Horn's response to the question of whether Mr. Dyer ever discussed'gifting her assets to her children is strained ***8** at best. A reading of her entire statement, particularly the portion "[i]f he did," makes clear that she was expressing a prediction of what she thinks she would have said in that situation. (R. 501; A.

237.) The Superintendent's explanation of this statement, that it expressed some sort of "unspoken 'no," cannot be reconciled with what Ms. Van Horn actually said.

Taken together, compels the conclusion that Ms. Van Horn, an **elderly** woman who openly acknowledged having memory issues, failed to recognize key documents and whose testimony on a key point, which she confidently presented, was flatly contradicted by what actually happened, lacked sufficient memory to credit her testimony at all. *See* Merrow, 495 A.2d at 1201; *W.S. Libbey Co.,* 446 A.2d at 43.

C. The Superintendent's Finding that Mr. Dyer Never Received a Voicemail From Old Mutual Lacked Substantial Evidence in the Record

The Superintendent's attempt to rehabilitate Ms. Van Horn's testimony that Mr. Dyer did not play her a voicemail from Old Mutual promising to refund her money falls short. The statement the Superintendent now relies on, that Ms. Van Horn "would have remember[ed]" if Mr. Dyer had played her a voicemail, hurts rather than helps the Superintendent's position. (Red. Br., 37.) Ms. Van Horn interrupted a question regarding whether she remembered hearing the voicemail in question to state "[o]h yes, I would remember that if they had said it." (A. 233.) But, Ms. Van Horn also said she would not have remembered if the insurance company did something in her interest (A. 233.) As was true with much of Ms. Van Horn's other testimony, these statements indicate that she had no present memory of the events in question. This is made even more apparent when read in context with her other testimony on the subject that "I don't remember [the voicemail message], *but that doesn't mean that it didn't happen."* (R. 467; ***9** A. 112.) It stretches Ms. Van Horn's testimony beyond its limits to read her first statement as an indication that no voicemail was ever played to her.

Mr. Laws' testimony is of little help either. Mr. Laws did not testify that Old Mutual's phone call record keeping was "scrupulously maintained", as suggested by the Superintendent. (Red. Br., 87) Rather, he testified only that he had no record of a phone call being made but indicated that omissions, while perhaps uncommon, were possible. (R. 443; A. 192). This is far from "devastating" as the Superintendent claims. It also cannot reasonably be read as substantial evidence of the non-occurrence of the voicemail.

D. The Superintendent's Arguments with Regard to Mr. Dyer's Remaining Factual Challenges are Without Merit

Mr. Dyer explained the SPIA to Ms. Van Horn. The Superintendent's arguments to the contrary ignore key portions of Ms. Van Horn's testimony. Shortly after providing a number of the "unequivocal" no answers the Superintendent points to (Red. Br., 28), Ms. Van Horn stated that Mr. Dyer "probably felt I understood [the SPIA contract] because I never really questioned anything about what he was doing." (R. 467; A. 203.) Ms. Van Horn's testimony, if it is to be credited, indicates that Mr. Dyer likely had no reason to think Ms. Van Horn did not understand the SPIA at the time. Moreover, Mr. Dyer testified that he had explained the SPIA to Ms. Van Horn numerous times. (A. 118-119).

Mr. Dyer warned Ms. Van Horn that the SPIA would have a lower yield and discussed gifting her assets. The Superintendent's claims to the contrary are based entirely on Ms. Van Horn's testimony. As discussed above, her testimony cannot reasonably be credited. Furthermore, as discussed above in Section II(b), with regard to whether Ms. Van Horn gifted any assets to her granddaughter, the record clearly indicates ***10** that Ms. Van Horn emphatically denied that she made such a gift, until she was shown indisputable evidence to the contrary.

Mr. Dyer ensured the SPIA was properly issued. The Superintendent's argument that he did not, ignores portions of Mr. Laws' testimony. As discussed in Section 1(B) of Appellant's Brief, the difference between what Ms. Van Horn was supposed to receive and what she did was non-obvious. Although he initially tried to blame Mr. Dyer for Old Mutual's mistake in the SPIA payments, Mr. Laws ultimately acknowledged that Old Mutual had made a mistake with regard to the SPIA and had made a similar mistake for approximately 135 other customers. (R. 364, 393; A. 160,169.)

The SPIA was appropriate for Ms. Van Horn. The Superintendent's arguments that it was not, fails to recognize that achieving some benefit in multiple areas can be the most advantageous course overall. Requiring that a product be the best possible option when there are multiple purposes is an unreasonable standard for insurance producers and consultants. In addition the Superintendent ignores or mischaracterizes the evidence, and adds tax arguments that were never made at the hearing.

The yield of the SPIA was negative because Old Mutual erred in issuing it. (R. 364; A. 160.) Furthermore, Mr. Dyer only approached Modern Woodman regarding the purchase of a SPIA to save Ms. Van Horn money. (R. 261; A. 106.) Finally, the tax savings that the SPIA achieved need not completely offset the decrease in yield from the Modern Woodman account for the SPIA to be appropriate. The SPIA was only one part of Mr. Dyer's plan that was designed to enable Ms. Van Horn to achieve some tax savings (given the large gift to LaPierre), diversify her assets, and plan for her long-term care needs. (R. 238, 250-51; 257-58, 463; A. 83, 95-96, 102-03, 199.) It was error for ***11** the Superintendent to rely on Mr. Laws to support the finding that the SPIA was not appropriate, when he testified that he was only "somewhat familiar" with the SPIA involved in this case, and was "not certain" whether it was designed or marketed for Medicaid purposes. (A. 159.) Moreover, Laws had previously advised the Bureau that some annuitants purchase SPIAs to help qualify for Medicaid. (R. 739).

The Superintendent mis-interprets Mr. Dyer's challenge to the Superintendent's inappropriate speculation regarding fraudulent conduct on Mr. Dyer's part. Mr. Dyer does not dispute that the Superintendent failed to find any fraudulent conduct on Mr. Dyer's part. In fact, that is a key reason why revoking his license was arbitrary, capricious and/or an **abuse** of discretion, as discussed below. What Mr. Dyer takes issue with is the Superintendent's gratuitous, and baseless, statements suggesting that his conduct was fraudulent or intentionally misleading. (R. 201, 203; A. 68, 70.) The Superintendent offers no explanation for those statements now. (Red. Br., 38.)

Mr. Dyer cooperated with Old Mutual. The record clearly indicates that Mr. Dyer, assisted by counsel, provided numerous relevant documents to Old Mutual, with whom he had had difficulty dealing with when sorting out Old Mutual's mistake in issuing the SPIA. (R. 377.) The Superintendent acknowledges this to be the case. Although Mr. Dyer's response was perhaps not to Old Mutual's liking, it over-reads the testimony to say that Mr. Dyer did not cooperate. At the hearing, Mr. Laws could not even remember what Mr. Dyer had provided. (A. 177-178).

Given the overall lack of credibility of Ms. Van Horn's testimony, along with Superintendents selective crediting of certain portions of the testimony of Mr. Laws, it is evident that the Superintendents findings lack substantial evidence in the whole record.

***12 III. The Superintendents Decision to Reinstate the Same Penalties was Legal Error, Arbitrary, Capricious and an Abuse of Discretion**

The Superintendent's decision to reinstate the same penalties, despite eliminating eight violations of 24-A M.R.S.A. § 2152, prohibiting unfair or deceptive conduct, ignored the effect of eliminating the violations had on Mr. Dyer's culpability. As this error goes to the heart of the decision to reinstate the same penalties, it is grounds to vacate the Superintendent's order by itself. On top of this, a review of the whole record reveals that revoking Mr. Dyer's license is disproportionately harsh considering that his alleged misconduct involved a single annuity product for a single consumer causing, at worst, less than $8,000 in harm. The arbitrariness of the Superintendent's decision is further illustrated by how conspicuously out of step the approach taken here when compared to earlier disciplinary matters.

A. The Superintendent's Decision to Reinstate the Same Penalties was Based on Legal Error

In his Brief, the Superintendent falls back upon the same flawed reasoning applied in the Order on Remand to now justify the decision to reinstitute the same penalties despite eliminating eight violations of Section 2152. The elimination of these eight

findings of unfair or deceptive conduct necessarily affects Mr. Dyer's culpability, a key factor in determining Mr. Dyer's penalty. (A.78.) The determination of what statute conduct violates goes to the heart of culpability. [7]

***13** The Superintendent's basis for reinstituting the same penalties, that Section 2152 did not affect Mr. Dyer's culpability, is contrary to this fundamental principle. It also reflects an unreasonable interpretation of Section 2152. The Superintendent's Order on Remand confirms this to be the case. As justification for not making the findings mandated by the Superior Court, the Superintendent claims that violations of Section 2152 would be "duplicative and have no independent significance", and whether the conduct involved also violated Section 2152 "would have no effect on my determination of the appropriate remedies in this case." This interpretation of Section 2152 treats it as superfluous and without meaning independent from the rest of Chapter 23 of Title 24-A. This is in clear violation of well establish norms of statutory interpretation. [8] *See Allied Res., Inc. v. Dep't of Pub. Safety*, 2010 ME 64,¶ 15, 999 A.2d 940, 944 ("[a]ll words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed"); *Schaefer v. State Tax Assessor*, 2008 ME 148, ¶13, 956 A.2d 710, 713 ("[w]e do not construe a statute in a way that renders portions of it meaningless"). It is also an unreasonable interpretation of Section 2152. *See id.*

The Superior Court acknowledged the significance of the unfair and/or deceptive act findings in the first 80C action when it remanded the matter back to the Superintendent, stating that "[b]ecause the section 2152 findings were an element of eight of the violations found and because the section 1447 violation was the basis for a ninth violation, *the entire question of penalties will have to be revisited on remand."* (A. 22.) ***14** The Superintendent eliminated the eight violations of Section 2152 rather than justify how Mr. Dyer's conduct violated that provision. He cannot now have it both ways. The Superintendent's re-imposition of the identical penalties fails to consider the effect of the elimination of the eight violations of Section 2152 on Mr. Dyer's culpability. As such, it constitutes the type of "wilful and unreasoning" decision, lacking "consideration of facts or circumstances," that is the hallmark of an arbitrary or capricious decision or an **abuse** of discretion. *See Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 5, ¶, 870 A.2d 566, 569.

The Superintendent does not squarely address what should be the starting and ending point on this issue: the language of Section 2152. *See Bankers Life & Cas. Co. v. Superintendent of Ins.*, 2013 ME 7,¶15, -- A.3d - (stating that "[i]n reviewing the interpretation of a statute, we will first look to the plain language..."); *Searle v. Town of Bucksport*, 2010 ME 89, ¶ 8 3 A.3d 390, 394 (Words and phrases that are not expressly defined in a statute must be given their plain and natural meaning). As discussed in Section II (A) of Appellants Brief, the terms "unfair" and "deceptive," imply a level of dishonesty and/or maliciousness that is not present in merely incompetent or untrustworthy conduct. Based on the common and natural definition of those words, there is a clear qualitative distinction between incompetent/untrustworthy conduct and unfair/deceptive conduct.

The distinction was clearly recognized from the beginning of the proceeding. In the Petition for Enforcement, the Bureau of Insurance *Staff* alleged that Mr. Dyer had demonstrated incompetence and/or untrustworthiness *and* used "dishonest practices" in Counts I, II, III, IV, VII, XII, XIII and XV. (A. 43-48). The Petition specifically references 2152 in several Counts. (A. 43-48). The Superintendent obviously believed ***15** that Mr. Dyer used "dishonest practices" that violated the unfair and/or deceptive acts or practices statute, which - even the Bureau Staff recognized - affected the nature and character of his actions and enhanced his culpability. To say now that the original finding of "unfair" and "deceptive" is "duplicative", has no "independent significance" and had "no effect on my determination of the appropriate remedies in this case" is disingenuous, and demonstrates a decision that was arbitrary and capricious and an **abuse** of discretion. What conduct is prohibited by other provisions of the Insurance Code does not change the common and natural definition of Section 2152's terms.

The Superintendent argues on appeal that statute requires the factfinder to look to the "effect" of the conduct on the consumer, not the actor's mental state, in determining whether a violation of 2152 has occurred. (Red. Br., 46) [9] . But if the effect of the conduct on the victim determines whether a Section 2152 violation has occurred, how can the Superintendent say that the Section 2152 findings were "duplicative", had no "independent significance" and "no effect on my determination of the appropriate remedies", when the effect of the conduct on the victim is a key factor in determining what penalty to impose. The Superintendent, on remand, specifically stated that "[t]he penalties and restitution that are warranted depend on the nature,

extent, and variety of the wrongful acts, *their cumulative impact on the victim*, and the consistency and duration of the pattern of misconduct...". (A.78) (emphasis added). Arguing that the effect of the act on the victim determines whether a Section 2152 violation has occurred, ***16** essentially admits that the eight violations were part of the "cumulative impact" on the victim and, therefore, a key factor in determining what penalty to impose on Mr. Dyer. The elimination of eight violations had to effect the cumulative impact on the victim, and therefore, the penalty.

The Superintendent cannot escape the fact that eliminating eight violations of Section 2152 affects Mr. Dyer's culpability. The unpersuasive, post-hoc interpretations of Section 2152 provided now by counsel do not change this fact. The Superintendent's failure to consider the effect of eliminating eight violations of Section 2152 on Mr. Dyer's culpability was legal error and makes the re-institution of the identical penalties arbitrary, capricious and an **abuse** of discretion. *See Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 5, ¶ 8, 870 A.2d 566, 569.

B. The Broader Context of Mr. Dyer's Relationship with Ms. Van Horn, Ignored by the Superintendent, Does Not Warrant Revocation of Mr. Dyer's License

The Superintendent's careful parsing of Mr. Dyer's relationship with Ms. Van Horn into eleven wrongful acts and hyperbolic suggestions of possible fraudulent conduct on the part of Mr. Dyer's ignores the broader context of that relationship. Without the ruling that Mr. Dyer's conduct was unfair and/or deceptive, his conduct constituted, for the most part, incompetence and untrustworthiness, centered on the sale of a single annuity to a single customer that caused, at worst, less than $8,000 in harm to that customer. (R. 202, 206; A. 69, 73). Staff for the Bureau of Insurance acknowledged as much during the opening argument at the hearing, stating "*...all the allegations, all the offenses charged come out of the same nucleus of facts,* [10] *and to sum up really, it's* ***17** *possible to say that this case comes down to the sale of an annuity...*" (R. 221) (emphasis added). Revocation of Mr. Dyer's license essentially ends his career in the insurance business for the foreseeable future. [11] Doing so on the basis of one transaction for one client with less than $8,000 in harm is disproportionately harsh and is an **abuse** of discretion.

C. The Superintendent's Prior Disciplinary Decisions and Consent Decrees Illustrate that Revocation of Mr. Dyer's Licenses was Arbitrary, Capricious and an Abuse of Discretion

The Court's consideration of prior disciplinary decisions of the Bureau of Insurance is entirely proper here. *Hall v. Board of Environmental Protection*, 498 A.2d 260 (Me. 1985), does not foreclose this. The Bureau's prior disciplinary decisions, including the consent orders, make plain that the Superintendent's pursuit of revocation here is a substantial deviation from prior cases and demonstrates the arbitrariness of the penalties assessed.

The facts here, however, fall well outside of Hall 's narrow pronouncement. At issue in *Hall* were fourteen applications, all of which were granted, filed by persons other than the petitioner. 498 A.2d at 266. Reviewing these would, in the Court's assessment, "take us, as a reviewing court, far beyond our well-established role of reviewing the administrative record for substantial evidence to support the agency's findings." 498 A.2d at 266. The prior disciplinary decisions here also cannot reasonably be compared to the fourteen applications, and related materials, at issue in *Hall*. The *Hall* court was ***18** essentially asked to evaluate the 14 unrelated applications - a re-determination it refused to undertake. 498 A.2d at 266. The Bureau's prior disciplinary decisions are strikingly similar to court decisions, recite facts and law and then apply the law to those facts so as to explain the reason for the Superintendent's decision. It almost goes without saying that consideration of such material is well within this Court's experience and expertise. It would not push the Court outside of the scope of its review to consider such material here.

Although administrative agency are not bound by *stare decisis*, a departure from established precedent or general policy, without explanation, may be overturned as arbitrary, capricious or an **abuse** of discretion within the meaning of the Administrative Procedures Act. *I.N.S. v. Yang*, 519 U.S. 26, 31 (1996); *see e.g. Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1125-26 (D.D.C. 2003) (vacating an agency disciplinary decision when the decision ran counter to prior disciplinary decisions and the agency failed to

explain the change in course). [12] The prior disciplinary decisions referenced in Appellant's Brief are instructive in the approach the Superintendent has taken when presented with certain facts. As is set forth in Section II(B) of Appellant's Brief, and to a lesser extent below, the Superintendent's decision to pursue revocation of Mr. Dyer'S license in this matter is a conspicuous departure from the Superintendent's approach in other cases. The Superintendent has offered no explanation for this. As such, it is absolutely appropriate ***19** for this Court to consider the referenced prior disciplinary decisions. *See Yang,* 519 U.S. at 31; *Ramaprakash,* 346 F.3d at 1125-26.

The Superintendent attempts to make much of the fact that the consent agreements were negotiated so as to avoid comparisons to the present case. The consent agreements are relevant precisely because they are negotiated agreements. Each consent agreement reflects a decision by the Superintendent to not pursue revocation of the individual's license. The fact that the Superintendent chooses to agree to this lesser penalty is what makes these agreements instructive. Presumably, neither the Superintendent nor the licensee would stipulate to factual findings that did not occur. Accordingly, the fact that in *McNally* [13] (Supplement of Legal Authorities ("Supp. Leg. Auth."), Tab #8.) and *Witham* [14] (Supp. Leg. Auth., Tab #16) the Superintendent pursued suspension of a licensees license, when the licensees conduct indicated only incompetence, illustrates the approach the Superintendent takes with regard to such conduct. In Harris (Supp. Leg. Auth., Tab #5), the Superintendent agreed to, among other penalties, a seven day suspension of the licensees license, civil penalties totaling $1,500 and a continuing education requirement despite finding that the licensee had falsified documents and mishandled a clients money. These consent decrees illustrate the type of behavior the Superintendent apparently believes worthy of only suspension of a licensee's license.

***20** Where the Superintendent seeks revocation of a licensee's license, it is when the licensee has engaged in clearly fraudulent conduct, *e.g. Hancock,* (Supp. Leg. Auth., Tab #4), or taken advantage of a relationship with the customer, *e.g. Juliano* (Supp. Leg. Auth., Tab #6). For instance, in Hancock, the Superintendent sought revocation of a producer's license where the evidence established that Hancock had harmed 13 consumers and, among other things, fraudulently induced multiple consumers to surrender an annuity without disclosing that they would incur a penalty. Hancock had also converted $80,000 of a client's money for his own use. (Supp. Leg. Auth., Tab #4). In Watts, the Superintendent sought revocation of a producer's license when he borrowed substantial amounts from his client, failed to pay back the amount owed, and caused over $75,000 in damages. (Supp. Leg. Auth., Tab #15). [15] To pursue revocation here, when such evidence is lacking, represents a departure from past practice that warrants an explanation. The Superintendent has provided none. This is evidence of an arbitrary or capricious decision or **abuse** of discretion. *See Yang,* 519 U.S. at 31; *Ramaprakash,* 346 F.3d at 1125-26.

CONCLUSION

For all the reasons set forth above, the appellant requests that the Superintendent's Decision be vacated.

Footnotes

1 The purpose for this is to ensure the development of a sufficient evidentiary record and findings of fact that, in turn, permits appellate review. *Sav. & Loan Ass'n of Bangor v. Tear,* 435 A.2d 1083, 1086 (Me. 1981). This is a practical standard that does not rely on formalism. *See e.g., Chasse v. Mazerolle,* 580 A.2d 155, 156 (Me. 1990) (holding that the plaintiff preserved an issue for appeal by mentioning it in her complaint even thought "these allegations were neither free from ambiguity nor the focus of argument before the Superior Court").

2 In particular, Ms. Van Horn's testimony was the primary, and in some cases only, source of evidence for findings 1,2, 3,4, 5, 6, 8, 10 and 11. (R. 198-205; A. 65-72.)

3 The Superintendent does not suggest that Dyer failed to raise, or waived, these issues before the Bureau.

4 Challenging findings in support of a bias argument is simply another way of saying that there is no competent evidence to support those findings. Tellingly, the Superintendent treated these arguments as though the sufficiency of the evidence had been challenged, pointing to testimony and other evidence purportedly supporting the Superintendent's findings. (Opposition of Respondent dated August 4, 2011, 28-33).

5 The record is rife with acknowledgments from Ms. Van Horn that her memory was unreliable. Ms. Van Horn testified that she did not recall hearing the voicemail message from Old Mutual, but stated "but that doesn't mean that it didn't happen". (A. 203). She did not recall receiving a June 9, 2009 letter from the Bureau of Insurance, but stated "...but that doesn't mean anything anyway". (A. 220-221). She did not recall the name of one of her financial advisors and stated "I have a hard time to remember my own". (A. 216-217). She stated: "I must be senile". (A. 226). When asked by Panel Member Robert Wake about one of the letters discussed during her testimony, Ms. Van Horn stated: "Can you remember what you did last week for a couple of hours in the afternoon? You're better than me, because I can't remember." (A. 236).

6 Moreover, it is disturbing to think that the Superintendent actually passes off Ms. Van Horn's repeated acknowledgments of her memory lapses as nothing more than self-deprecating jokes. This is no joking matter. The Superintendent revoked Mr. Dyer's two insurance licenses based almost exclusively on Ms. Van Horn's memory.7

7 For instance, causing the death of another is conduct that can be, and often is, considered wrongful in the criminal context. What statute the conduct violates, either 17-A M.R.S.A. § 201, prohibiting murder, or 17-A M.R.S.A. § 203, prohibiting manslaughter, or whether it is determined to be self-defense pursuant to 17-A M.R.S.A. § 108, is directly relevant to the question of what, if any, penalty is imposed. *Compare* 17-A M.R.S.A. § 1251 (setting forth penalties for murder) *with* 17-A M.R.S. § 1252 (setting forth the punishment for crimes other than murder). The punishment meted out is not determined solely on the basis that an individual caused the death of another. *See id.*

8 Although an agency is generally entitled to deference in the interpretation of statutes within their area of expertise, when such a statute is ambiguous the agency's interpretation will not control when it is unreasonable. *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271, 275. The statute here is ambiguous, as indicated by the Court in its January 18, 2012 order requesting clarification. (R. 1000). The Superintendent's interpretation of 24-A M.R.S. § 2152 is unreasonable and, thus, is properly disregarded. *See id.*

9 The statute provides that no person "... shall engage... *in any trade practice which is defined in this chapter, as, or determined pursuant to this chapter, to be.* an unfair or deceptive act or practice in the business of insurance." 24-A M.R.S.A. § 2152 (emphasis added). In the original decision, the Superintendent did not rely on any act or practice "defined" as unfair or deceptive under the statute. Rather, according to the Superintendent's brief, the Superintendent determined that the effect of Mr. Dyer's conduct on Ms. Van Horn, violated the unfair and/or deceptive acts or practices statute - eight times.

10 Section I(D) of Appellants Brief addresses the lack of substantial evidence in the record to sustain any of the Superintendent's suggestions of fraudulent conduct on Mr. Dyer's part.

11 Although Mr. Dyer could theoretically re-apply for either a producer or consultant license one year after the date of the Court's decision in this matter, 24-A M.R.S.A. § 1418(1), given the Superintendent's approach to Mr. Dyer throughout these proceedings, it appears reasonable to assume that it would be highly unlikely that Mr. Dyer would be successful if he were to re-apply. Given that, the Superintendent's revocation of Mr. Dyer's licenses effectively ends his career in the insurance business.

12 The Maine Administrative Procedures Act mirrors its Federal counterpart. *See Maine Sch. Admin. Dist. No. 27 v. Maine Public Employees Retirement Sys.*, 2009 ME 108, ¶ 13, 983 A.2d 391, 395. This is particularly true with regard to the provisions governing judicial review of agency decisions. *See id.; compare* 5 M.R.S.A § 11007 *with* 5 U.S.C. § 706. Both statutes employ the arbitrary, capricious or **abuse** of discretion standard of review. *See* 5 M.R.S.A. § 11007 5 U.S.C. § 706(2)(A). Given this, interpretation of the Federal Administrative Procedures Act with regard to what constitutes arbitrary, capricious or an **abuse** of discretion "offers usual guidance" when interpreting Maine'S version. *See Maine Sch. Admin. Dist. No. 27*, 2009 ME 108,¶ 13, 983 A.2d at 395.

13 In *McNally* (Supp. Leg. Auth., Tab #8), the licensee mistakenly caused his client to be denied supplemental Medicare coverage, due a failure to understand certain provisions of the Maine Insurance Code, shortly before the client was hospitalized and incurred uninsured medical expenses.

14 In *Witham* (Supp. Leg. Auth., Tab #16), the licensee caused his client to lose the right to receive certain benefits under a Medicare supplement plan by virtue of attempting to enroll the client, without meeting her, into a Medicare Advantage plan without understanding the effects of doing so on her other coverage or investigating what other coverage she had or advising her on the effects of enrolling in the new plan.

15 Superintendent's comparisons of the present matter to *Costa*, *Lillybridge* and *Merritt* is inapt *Costa* involved a producer who grossly misrepresented his experience in advertisements to lure in consumers and used misleading product comparisons. *Lillybridge* involved allegations that a producer intentionally misrepresented the terms of an insurance product and forged another's name to a document involved in an insurance transaction. Merritt also involved forging another's name to a document involved in an insurance transaction and intentionally misrepresenting the terms of an application for insurance. These decisions do not stand for the proposition that deceptive statements to a regulator warrant revocation. Moreover, *Lillybridge* and *Merritt* involved producers who failed to respond at all to inquiries from regulators. These decisions have no bearing here where Mr. Dyer has clearly participated at all levels of these proceedings and the Superintendent acknowledges that Mr. Dyer provided numerous documents upon request.

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